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NTSB Order No. EA-4468

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 15<sup>th</sup> day of July, 1996

DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Dockets SE-13961
v.	)	SE-13962
	)	SE-13963
M.T. WILLETTE,	)	
G.C. BURGHARDT, and	)	
C.T. GANLEY	)	
	)	
Respondents.	)	
	)	

**ORDER**

Respondents have appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held on June 20, 1995, where the law judge affirmed the violations set forth in the Administrator's orders (complaints).<sup>1</sup> Specifically, the

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<sup>1</sup>Under the provisions of the Aviation Safety Reporting Program (ASRP), sanction was waived.

Administrator had alleged that, on February 14, 1994, Respondent Ganley, as pilot-in-command of USAir Shuttle Flight 6450, a Boeing 727, and Respondent Willette, second officer, violated sections 121.315(c), 121.537(f), and 91.13(a) of the Federal Aviation Regulations (FARs) by failing to follow the approved cockpit check procedures, thus allowing the aircraft to depart the gate with insufficient fuel.<sup>2</sup> Respondent Burghardt, as First Officer, was charged with operating an aircraft in a careless or reckless manner, in violation of FAR sections 121.537(f) and 91.13(a). This order is written to provide the parties with an opportunity to further develop certain pivotal issues necessary to the disposition of the appeal.

This case arose from the following facts. On February 14, 1994, respondents were scheduled to operate a Boeing 727 for USAir Shuttle from Washington National Airport to LaGuardia Airport between 8:00 and 9:00 a.m., returning to Washington National between 10:00 and 11:00 a.m., and then back to LaGuardia at 12:00 p.m. (Transcript (Tr.) at 136.) According to Captain Ganley, the return flight to Washington was 28 minutes late due

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<sup>2</sup>The pertinent FAR sections state, as follows:

**§ 121.315 Cockpit check procedures.**

(a) Each certificate holder shall provide an approved cockpit check procedure for each type of aircraft.

(b) The approved procedure must include each item necessary for flight crewmembers to check for safety before starting engines, taking off, or landing, and in engine and systems emergencies. The procedures must be designed so that a flight crewmember will not need to rely upon his memory for items to be checked.

(c) The approved procedures must be readily usable in the cockpit of each aircraft and the flight crew shall follow them when operating the aircraft.

**§ 121.535 Responsibility for operational control: Flag air carriers.**

\* \* \* \*

(f) No pilot may operate an aircraft in a careless or reckless manner so as to endanger life or property.

**§ 91.13 Careless or reckless operation.**

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

to "ground holding" in New York. Id. Consequently, the crew had less time to prepare for the 12:00 flight to LaGuardia, the flight at issue. Captain Ganley testified that, by radio, he had prearranged the fuel load (24,000 pounds) and that when he deplaned and looked under the aircraft, the fueller was already hooked up to the aircraft dispensing the requested fuel. (Tr. at 138.) He went inside to the operations department, reviewed the weather, and signed the necessary paperwork at about 11:45 a.m. for the upcoming flight.<sup>3</sup>

Captain Ganley returned to the aircraft, checked the overhead panel, ran through switch maneuvers, and called for the checklist. Shortly after the cockpit crewmembers started the checklist, they received their clearance to New York with a known 33-minute delay and were asked whether they wanted to "take the delay on the gate" or at the holding area. (Tr. at 139.) After checking with ground control, Captain Ganley elected to take the delay at the holding area since "the company wants us off the gate because of inbound airplanes, if at all possible." (Tr. at 140.)

It appears that, when the crewmembers returned to the checklist, they were interrupted by a jumpseat rider from Business Express who, in accordance with policy, sought approval from the captain to ride jumpseat. The evidence is that the crew resumed the checklist duties but were distracted again, this time by an argument at the cockpit door between the boarding agent and the senior flight attendant over the accuracy of the passenger head count. Captain Ganley testified that he could not say with certainty that the checklist was ever completed. (Tr. at 141.)

After the aircraft pushed back from the gate and pulled into the holding area, Captain Ganley shut down the numbers two and three engines to conserve fuel. The crew waited for clearance from ground control to taxi to the runway, switched on the engines, and were cleared for takeoff. They performed the before-taxi checklist and, at the fuel check, realized that they did not have all the fuel onboard that had been requested. At that point, Captain Ganley made the decision to return to the gate for refueling.

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<sup>3</sup>Captain Ganley testified that, at Washington National, the fueller is not permitted onto the aircraft via the jetway but, instead, drops the fuel slip either on the agent's desk or clips it onto a board near the wall inside the jetway. (Tr. at 145-46.) The agent then should deliver the fuel slip to the cockpit. In this instance, however, the slip was not delivered. Captain Ganley also testified that he later learned that the fueller had run out of fuel while attempting to refuel the aircraft, left to refill the truck tank but, upon returning, hooked up to the wrong aircraft, and then changed the aircraft number on the fuel slip. (Tr. at 147.)

Among the respondents' arguments on appeal is the claim that the Administrator is estopped by his own policy, enumerated in Advisory Circular 120-56 (Air Carrier Voluntary Disclosure Reporting Procedures, Ex. A-3), from bringing any enforcement action in this case because, according to that Advisory Circular, air carriers are encouraged to self-disclose violations to the FAA, with the understanding that enforcement action will not be pursued.<sup>4</sup> Respondents allege that they immediately reported the

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<sup>4</sup>As stated in Advisory Circular 120-56,

[T]he FAA believes that aviation safety is well served by incentives to certificate holders to identify and correct their own instances of noncompliance by investing more resources in efforts to preclude their recurrence. The FAA's newly adopted policy of foregoing civil penalty actions when a certificate holder detects violations, promptly discloses violations to the FAA, and takes prompt corrective action to ensure that the same or similar violations do not recur, is designed to encourage compliance with the FAR, foster safe operating practices, and promote the development of Internal Evaluation Programs.

(Ex. A-3 at 1.)

In the section entitled, "SEPARATE ACTION AGAINST AIRMEN," the FAA explains how the policy applies to airmen involved in an instance of noncompliance that has been disclosed by an air carrier:

a. The voluntary disclosure policy applies to individual airmen or other agents of a carrier when the carrier makes a disclosure and is the *focal point of a case*, and the following conditions are met:

(1) The apparent violation occurred while the airman or agent was acting on behalf of a certificate holder involved in FAR Parts 121 or 135 operations.

(2) The airman immediately must make the first report of the apparent violation to the employing certificate holder.

(3) The FAA is notified immediately. The employing certificate holder must notify the FAA of the apparent violation immediately after the airman reports it to the carrier.

b. If all the above conditions are not met, the principal inspector will review all facts associated with the case and determine what action is appropriate for

incident to their superiors at USAir Shuttle, who then reported it to the FAA, and the evidence of record may support this claim. Respondents argue that Shuttle officials suspended them for 30 days, gave them additional training, and assured them that the FAA would not pursue enforcement action. Respondents also contend that this incident was the result of a carrier-based problem and that, in light of the company's assurances and the FAA's past practices, the Administrator should not have undertaken the instant enforcement actions. On the other hand, FAA Inspector Kevin O'Donnell testified that his investigation of the incident revealed "no inappropriate action on the part of the air carrier," and that the procedures in the carrier's operations manual and checklist were adequate.<sup>5</sup> (Tr. at 50-51.) However, the record indicates that after this incident, USAir Shuttle changed its fueling procedures, undertook retraining on checklist procedures, and modified the fuel-check procedures in its checklist.<sup>6</sup>

Given the circumstances of this incident and the changes undertaken by the carrier, it is unclear why the Administrator would characterize this incident as solely a crew problem. The record presented thus creates a number of questions that require answers before the case may be resolved, such as:

(1) On what basis, and by whom, was a determination made  
(..continued)  
individual airmen or other agents of the carrier.

(Ex. A-3 at 7, emphasis added.)

<sup>5</sup>In carrying out his investigation, Mr. O'Donnell never spoke with the crew. (Tr. at 73.)

<sup>6</sup>Captain George Chamberlain, USAir Shuttle Safety Coordinator and Manager of Flight Safety and Standards, testified as follows:

[W]e found out that we had a problem obviously with the fuelers in Washington as to how they were reporting that the fueling on the aircraft was complete and that they were as accurate as they should be and that the fueling slips were delivered to the aircraft in a timely manner. And we found out that even though we thought that that was occurring, it wasn't.

So we changed our procedures to ensure that those fueling slips were more accurate and were delivered precisely on time.

(Tr. at 123.) He further testified that USAir Shuttle also changed its checklist procedures by adding a specific requirement for the crew to read each fuel gauge. (Tr. at 125.)

that the problems identified were crew-based rather than carrier-based? Was this decision consistent with Advisory Circular 120-56, and the provisions therein, contemplating that the Principal Operations Inspector may accept a "comprehensive fix"? Is a violation of the Federal Aviation Regulations by the carrier necessary for the problem to be considered carrier-based, as appears to be the suggestion in testimony of the POI?

(2) What approach is to be taken if problems appear to be both carrier and crew-based? Does the approach sponsored by the FAA in this proceeding require the FAA to ignore carrier involvement in order to proceed with individual enforcement?

(3) What steps were taken, at the introduction of Advisory Circular 120-56, to explain its functions and FAA procedures for the review of self-disclosure? What has been the FAA experience with the program, and have there been other enforcement actions predicated on disclosure under the circular?

(4) What weight should the Safety Board give to the arguments of respondents that findings of a violation here will chill any future participation in the self-disclosure programs?

As the foregoing questions and the record in this proceeding raise an issue as to whether affirmance of the Administrator's order is consistent with safety in air commerce, additional briefs addressed to the questions above are requested. The Board will entertain requests for oral argument, and reminds interested persons of the provisions of 49 C.F.R. § 821.9 regarding amicus filings.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The parties are accorded 40 days from the date of this order to file supplemental briefs addressed to issues raised above; and

2. Requests for oral argument, if any, should be transmitted within 10 days of the date of this order.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.